No. 10996

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE KERR,

Appellant,

— vs. —

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge.*

BRIEF OF APPELLEE

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QUESTIONS PRESENTED

First: Does the theft of each of three mail bags taken at the same time from a mail custodian constitute three separate and distinct offenses under Title 18, U.S.C.A. Section 317, as charged in Counts 4, 5 and 6 of the indictment herein?

Second: In view of the fact that pending settlement of fine the appellant herein is not now and was not at time of his previous appeal (130 F. (2d) 637, 639) entitled to immediate release, even if all unserved counts were invalid, can it be said the first question is now before the court and was not at that time?

STATEMENTS OF PLEADINGS AND FACTS

On September 1, 1944, appellant appearing by legal counsel filed his present petition for writ of habeas corpus in the District Court of the United States for the Western District of Washington, Southern Division, alleging among other things that his sentence was imposed and commenced to run on March 12, 1934, which he has served continuously since; that the court was without jurisdiction to sentence him on counts 5 and 6 of said indictment; that computation shows that he has completed service of the legal maximum time of imprisonment imposed under counts 2, 4, and 7, being entitled to good time allowance; that he is a pauper and has served a period in excess of 30 days by reason of fine imposed under count 7, but is not entitled to apply for leave to take the pauper's oath and have the court determine that he is in fact

a pauper until such time as the court determines he has served the maximum legal imprisonment. (Tr. 2-6).

The District Court thereupon issued an Order to Show Cause, returnable September 11, 1944 (Tr. 7). The appellee Warden appeared by the United States Attorney for said district and demurred to the petition. (Tr. 8.) Thereafter on September 27, 1944, time of further hearing, appellee's demurrer was overruled and appellant was granted leave to amend his petition (Tr. 16), which application after hearing October 16, 1944, on the amended petition, the return thereto (Tr. 8-12), and reply (Tr. 14-15) was denied and appellant was remanded to the custody of appellee to complete the service of his sentence. (Tr. 14-24).

December 29, 1944 appellant filed with the clerk of said District Court his notice of appeal (Tr. 25), from order of dismissal formally entered December 23, 1944 (Tr. 23-24). Order extending time to docket this cause was entered February 6, 1945. (Tr. 28-29).

Some three or four years previous to his present application, the appellant after having served that portion of his sentence in the United States Penitentiary, Alcatraz, California, which with credit for good behavior and industrial good time would have entitled

him to release from sentence equivalent to ten years and two years on counts 2 and 7, filed his petition for writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division, alleging sentences on counts 4, 5, and 6 illegal and void and constituting double jeopardy and double punishment in that the crime alleged in said counts 4, 5, and 6, and the sentences thereunder were for the same offense set forth in count 2 of the indictment and punished thereunder.

The California District Court denied appellant's petition and this court affirmed the decision below, and held the offenses charged in count 2 was distinct from the offenses charged in counts 4, 5, and 6; that the offenses charged in counts 4, 5, and 6 were distinct from each other; and the status of the undisposed of fine under count 7 would not in any event entitle appellant to a present release by writ of habeas corpus.

See *Kerr v. Johnston, Warden*, (C.C.A. 9, September 10, 1942), 130 F. (2d) 637.

Thereafter appellant was transferred to the United States Penitentiary on McNeil Island, Washington, where he is now serving sentence under said judgment of the court.

ARGUMENT

1. THE THEFT OF EACH OF THREE MAIL BAGS TAKEN AT SAME TIME FROM CUSTODIAN IS A SEPARATE OFFENSE.

The Statute involved in this proceeding is Title 18, U.S.C.A. Section 317, which provides as follows:

> "Whoever shall steal, take, or abstract * * * from or out of any * * * post office * * * any letter, postal card, package, bag, or mail * * * shall be fined not more than $2,000, or imprisoned not more than five years, or both."

The related offenses defined in Sections 312 and 313 of said title make the injury to and theft of such mail bag, respectively, a separate and distinct offense.

And this court in a former appeal herein has so construed the above Section 317 as to the counts of the indictment here involved.

Kerr v. Johnston, 130 F. (2d) 637, 639.

The theft of each mail bag whether in use or merely belonging to the Post Office Department is a separate offense under the terms of Title 18, U.S.C.A., Section 313, and has been so held in the case of *Phillips v. Biddle,* (C.C.A. 8, 1926), 15 F. (2d) 40, 41, citing as direct authority *Ebeling v. Morgan,* 237 U. S. 625, wherein the Supreme Court at pages 629-630, said:

> "The separate counts each charged by its distinctive number the separate bag, and each time one of them was cut there was, as we have said, a separate offense committed against the statute. Congress evidently intended to protect the mail in each sack, and to make an attack thereon in the manner described a distinct and separate offense."

The court in the Ebeling case did not extend such protection to each letter or piece of mail in the sack as a separate entity, but gave to such contents a blanket protection.

And citing as authority the same case, this court in the case of *Johnston v. Lagomarsino*, 88 F. (2d) 86, 88, held:

> "These two sections (312 and 317) apply to two separate and distinct offenses. One injury to a 'mail bag', and the other refers to taking from a depository of 'mail matter'. Each has a distinctive function. The mail bag carries the mail and informative matter, and such was no doubt the intent of the Congress, for mail could not have been intended by Congress as a generic term and cover the express purpose of these sections, which are to protect the *bag* and the *mail within the bag*. (Italics ours). The intent of the act is to make it an offense to cut each mail bag and when a bag was cut the offense was complete. *Ebeling v. Morgan*, 237 U.S. 625, 35 St. Ct. 710, 59 L.Ed. 1151."

To contend that the three sacks here involved were along with their contents just so much mail mat-

ter is to overlook the reasoning of the courts and the apparent purpose disclosed in the language of the several statutes.

This court in the case of *McKee vs. Johnston*, 109 F. (2d) 273, 275, followed the Ebeling case in its interpretation of Section 317, holding:

> "No distinction of significance can be drawn between the statute there involved, 18 U.S.C.A., Section 312, and the one before us. A locked and registered mail pouch, consigned by the postal authorities to a named destination, is an authorized depository for the mail matter contained in it. It is made an offense to steal a letter from any authorized depository. It is also an offense denounced by the statute to abstract from a mail pouch any article or thing contained therein. *Here, each of the pouches bore a different number and the required proof of the theft differed in the case of each pouch.*" (Italics ours).

In the McKee case this court followed the construction laid down in the Ebeling case and did not find three letters taken from a single pouch constituted three separate offenses. On the other hand, the court did find in the words of the Supreme Court:

> "Congress evidently intended to protect the mail in *each* sack, * * *" *Ebeling v. Morgan*, supra.

Therefore, to contend that the wholesale theft of three mail bags from the hands of a mail custodian constitutes but a single offense is not only to

make an exception to the Supreme Court's construction of protection for each mail bag, but also to claim without any apparent reason for such theft, a far lesser penalty than for the theft of three mail bags from a railway post office.

See *Phillips v. Biddle*, supra.

Appellant would confuse the nature of the offense under Section 317, supra, with that of a continuous offense, such as illicit cohabitation, a single offense, as held by *In Re Snow*, 120 U.S. 274, or larceny at common law as distinguished in *Braden v. United States* (8th Circ.) 270 F. 441, 444; or where the gist of the offense is such as the case of unlawful transportation of women in interstate commerce, *Robinson v. United States*, 143 F. (2d) 276; or sale of narcotics, *Parmagini vs. U. S.* 42 F. (2d) 721.

Simultaneous taking or act may have been pleaded to cover a multitude of offenses in such cases where no statutory or natural numerical limitation was set upon a single offense either as to things or persons involved or acts done. But, such was not the test applied by the Supreme Court in its construction as to the theft of each mail pouch. *Ebeling v. Morgan*, supra, *Morgan v. Devine*, 237 U.S. 632, and cases there cited.

And in *Morgan v. Devine*, supra, at page 639, the court quoted from Bishop's Criminal Law, 8th Ed.:

> "The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second count cannot be maintained; when there could not, it can be."

And to the same effect and following the Ebeling case is *Blockburger v. United States*, 284 U.S. 299, 303, cited in *Robinson v. United States*, supra.

> "The test is whether the individual acts are prohibited or the course of action which they constitute."

Blockburger v. United States, supra, page 302, quoting from Wharton's Criminal Law, 11th Ed.; *Braverman v. United States*, 317 U.S. 49, 54, reversing 125 F. (2d) 283.

And *Colson v. Johnston*, 35 F. Supp. 317, 318, forbidding the making of separate acts of robbery out of what was in fact a single robbery, is not at variance with the cases above cited.

The case of *McDonald v. Hudspeth*, 129 F. (2d) 196, 199, holding the number of offenses committed in a bank robbery for putting in jeopary the life of *any* person, would be equivalent to the number of lives so affected and charged, is an example of one trans-

action simultaneously performed, constituting by statute a number of offenses. See Section 588(b), Title 12, U.S.C.A. See also *Gavieres v. United States*, 220 U.S. 338; *Burton v. United States*, 202 U.S. 344, 377.

2. The validity of counts 4, 5, and 6 were before the court in appellant's former appeal as now (130 F. (2d) 637), if the question is proper in these proceedings where appellant must still serve a part of his sentence not assailed as invalid.

Under the rulings as found, footnote 6, in *McNally v. Hill*, 293 U. S. 131, 139, the Circuit Court of Appeals in circuits other than the 8th have uniformly denied petitions for writ of habeas corpus when the prisoner was not at the time serving the part of sentence said to be invalid.

This ruling has not been strictly adhered to in some cases.

See *Colson v. Aderhold*, 5 F. Supp. 111.

This court in *Ex parte De Maurez*, 106 F. (2d) 457, 458, and again in *DeMaurez v. Squier*, 121 F. (2d) 960, under circumstances somewhat similar as here, held the offenses there charged were separate and distinct, refusing, however, in the latter case to

decide which of the two statutes in question was violated.

If under the holding in *Hogan v. Hill*, 9 F. Supp. 333, 337, appellant's application is to be considered not premature, although the writ must be denied in any event, there would seem no logical contention could be made against this court having passed upon the issue here at the time of the former appeal, except that in the nature of the proceedings further litigation should not be discouraged.

CONCLUSION

For the foregoing reasons, it must be contended the decision below should be affirmed.

Respectfully submitted,

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